

# THE US-ISRAEL LEGAL REVIEW 2021

## STARTUPS, UNICORNS AND THE 'SPAC' PHENOMENON



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# The Notion Formerly Known as Privacy – One More Aspect of Long COVID

*The COVID pandemic has challenged many basic notions of privacy and human freedoms since March 2020. While certain rulings of the Israeli Supreme Court may be encouraging, the overall privacy situation is still under constant attack.*

As we move into 2022, it appears that COVID is here to stay – at least for a while, and with it – the continuing erosion of our privacy. Despite some good news (from the legal, pro-privacy, point of view), many of our (and our children's) daily activities are still being supervised, monitored and recorded. With all due respect and appreciation to the Israeli Privacy Protection Authority (the “PPA”) and to the privacy activists, it appears that they are all fighting an uphill battle. In this article we will discuss some of the main COVID-related privacy issues which kept us busy in 2021.

## SUPREME COURT RULING

The main achievement of the privacy advocates in 2021 is probably the Supreme Court's ruling in HCJ 6732/20 **The Association of Civil Rights in Israel, et al. vs. The Knesset et al.** This ruling is yet another chapter in the continuing saga of petitions submitted against the use of the GSS (the General Security Service, commonly referred to as the “Shin Bet”) phone tracking system for the conduct of epidemiological investigations. The use of such system started as early as April 1, 2020, initially based on emergency regulations promulgated

under the Basic Law: The Government<sup>1</sup>; then by a government resolution, relying on Section 7(b) (6) of the General Security Service Law, 2002<sup>2</sup>, and after the Supreme Court ruled that such authorization should be granted by a statute and not by a government resolution<sup>3</sup>, by a specific law<sup>4</sup>. Ostensibly, the GSS-COVID Law was to be implemented for short periods of time, subject, each time, to strict governmental scrutiny and to governmental approval. In reality, the government repeatedly (and automatically) approved the use of the GSS, **twelve times in a row**. The Supreme Court (with an extended bench of 7 justices) ruled that the GSS-COVID Law severely impairs citizens' rights to privacy as it allows the GSS to collect and share information about their health situation and geo-location and that there is no transparency with regard to the processing, storage and sharing of such personal information. Having said that, the court noted that, given the imminent risk of the COVID pandemic, the law is constitutional and valid, yet the government's discretion with regard to the implementation thereof and the periodical (and consecutive) extensions of the authorization of the GSS (irrespective of the fluctuations in

the general health situation, the disagreements with regard to the effectiveness of the GSS' tools and the expedited vaccination campaign) was lacking, unreasonable and non-proportional, and hence voidable. Thus, the court ruled that: (i) the government should set specific and transparent criteria for the use of the GSS for the conduct of non-voluntary epidemiological investigations (e.g., based on number of patients, contagion rate, etc.); and (ii) even upon meeting such criteria, the use of the GSS' tools should be limited only to cases where sick people refuse to cooperate with the epidemiological investigations or otherwise fail to cooperate with same.

## LEGISLATION ANNULMENT

In another case, prompt legal action caused the de facto annulment of legislation which allowed the Ministry of Health to transfer personal details of anti-vaxxers (or COVID sceptics) to their respective local councils and municipalities, to the Ministry of Education (with regard to teachers) and to the Ministry of Welfare (with regard to social workers and care givers), so that the recipients of such data may "encourage" such persons to get vaccinated<sup>5</sup>. The Association of Civil Rights in Israel ("ACRI") petitioned against such legislation, the Supreme Court issued an interim order, suspending any transfer of information under such law<sup>6</sup> and the legislation in question expired (and was not renewed) before the Supreme Court ruled on the merits.

With that, and notwithstanding the temporary remission between March and July 21, the "Fourth Wave" (the Delta variant) took its toll:

- The continued remote learning and remote working patterns invaded the privacy of (practically) every household, turning each living room into a recording studio and exposing the participants' domestic environment.
- Moreover, many academic institutions required that their students who take remote exams install two web cams, allow access to their computers and take further measures to diminish their privacy<sup>7</sup>.
- The extensive use of the "Green Pass"/ COVID Certificate requires us to present such certificates (with our ID and passport numbers) in theatres, concert halls, hotels, government



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offices, etc<sup>8</sup>. The regulations governing the presentation and scanning of such certificates are silent about the use and protection of such information, and thus such information may, or may not, be kept, used, transferred, or remain protected<sup>9</sup>.

- Moreover, certain arenas and theatres have started using face-recognition technologies in order to screen and identify holders of green passes – again without any clear regulations governing the use and protection of the biometric data acquired by such systems<sup>10</sup>.

## CURRENT STATUTORY THREATS ON PRIVACY

But the threats on privacy are not limited to COVID related matters (yet, the general "erosion" of the right to privacy caused by same may serve as a hotbed for additional measures).

In July this year the Israeli government published a Memorandum of Law for Amendment of the Police Ordinance [New Version] (Amendment No.\_\_\_\_) (Special Photographic Systems), 5721-2021. This memorandum seeks to mandate, through primary legislation, the use of special photography systems, including systems for photographing license plates (LPR) and biometric face recognition (FR). The memorandum also allows the Minister of Internal Security to allow the use of additional systems and optical surveillance measures without the obligation to publish such use. So far, this

memorandum was met by vehement opposition – both from governmental agencies, among others, the Israeli Cyber Authority (who assert that the use of face recognition techniques in the public domain is not only contrary to the basic rights to privacy, but also poses a material security risk)<sup>11</sup> and the PPA<sup>12</sup>, and from public interest groups, such as the Israeli Tech Policy Institute<sup>13</sup> and the ACRI<sup>14</sup> – among others – due to its vagueness with regard to the data collection methods, the types of data collected and the use thereof, due to the uniform treatment of various types of data (e.g., license plates registration versus facial recognition), due to the “blank check” given to the Minister of Internal Security to approve and implement additional data collection measures and due to the creation of a huge database which may not be subject to judicial oversight.

On December 13, 2021 the Knesset (the Israeli Parliament) has approved (upon first reading, as part of a three-steps legislation process) a governmental bill, allowing police officers to conduct searches in private premises without a court warrant, if the failure to conduct such search immediately may undermine the purpose of such search, and a search warrant could not have been obtained beforehand, provided that one of the following conditions is met: (i) the possessor of the premises or a person who is present at the premises calls for the help of the police and there is a reasonable suspicion that a crime is being committed; (ii) there is a reasonable suspicion that a felony is being committed or has been recently committed in such premises; or (iii) there is a reasonable suspicion that an object who may serve as an evidence to the commitment of a serious felony<sup>15</sup> and the search is immediately required, in order to prevent the destruction of, or tampering with such evidence, provided that such search shall be: (a) approved by a commanding police officer; and (b) duly recorded; or (iv) there is a reasonable suspicion that a suspect of a serious felony which has been recently committed or a person who escaped from or evaded an arrest, imprisonment or legal detention is present at such premises.<sup>16</sup>

As noted above, it appears that COVID is here to stay, at least for the first half of 2022, so that it is yet premature (to say the least) to conclude the discussion about the long-term impact of COVID on

privacy. As we are currently struggling with the Omicron variant, and as the Israeli government is considering further preemptory measures, we should probably follow the British WW2 advice and “Keep Calm and Carry On” (protecting public health and safety, while safeguarding the right to privacy). ■

## ABOUT THE AUTHOR

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## NOTES

1 The Emergency Regulations (Authorization of the General Security Service to Assist in the National Effort to Limit the Spreading of the New Corona Virus), 2020.

2 The Section provides that the GSS may engage in “any other activity in any other domain, designated by the government, with the approval of the Knesset Committee for the GSS matters, which activity is intended to uphold and promote state interests which are crucial to the state’s national security.

3 HCJ 2120/20 **Ben Meir et al. versus The Prime Minister et al.**

4 The Law for the Authorization of the General Security Service to Assist in the National Effort to Limit the Spreading of the New COVID Virus and the Facilitation of the Use of Civil Technologies for the Location of Persons Who Were in Close Contact with Sick People (Temporary Provision), 2020 (the “GSS-COVID Law”).

5 The Law for the Amendment of the People’s Health Ordinance (No.36 – Temporary Provision – the New Corona Virus)

6 HCJ 1441/21 **The Association of Civil Rights in Israel et al. versus The Knesset et al.**

7 See the PPA White Paper: “Major Points and Recommendation for the Protection of Privacy in Remote Tests which Includes Measure for the Protection of the Dignity of Exams in Advanced Education Institutions (in Hebrew)

[https://www.gov.il/he/Departments/publications/reports/privacy\\_academic\\_studies\\_corona](https://www.gov.il/he/Departments/publications/reports/privacy_academic_studies_corona)

8 Regulations Governing Special Powers for the Engagement with the New Corona Virus (Restrictions of Activities of Public or Business Places and Additional Provision) (Temporary Provision), 2021

9 Orly Halpern, In Israel, we happily gave up privacy to get our pre-covid lives back, **Washington Post**, April 23, 2021 ([https://www.washingtonpost.com/outlook/in-israel-we-happily-gave-up-privacy-to-get-our-pre-covid-lives-back/2021/04/22/3d300ad4-a2bf-11eb-85fc-06664ff4489d\\_story](https://www.washingtonpost.com/outlook/in-israel-we-happily-gave-up-privacy-to-get-our-pre-covid-lives-back/2021/04/22/3d300ad4-a2bf-11eb-85fc-06664ff4489d_story)).

html). See also the White Paper of the Italian Privacy Protection Agency in this regard: [https://gppd.it/web/guest/home/docweb/-/docweb-display/docweb/9578203#english\\_version](https://gppd.it/web/guest/home/docweb/-/docweb-display/docweb/9578203#english_version)

10 Nitzan Shafir, "The use of face recognition technology with regard to holders of green passes in Habima Theatre and in Bloomfield Arena is contrary to privacy and is illegal", **Globes**, May 20, 21 (In Hebrew) <https://www.globes.co.il/news/article.aspx?did=1001371568>

11 <https://www.haaretz.com/israel-news/premium-top-israeli-cyber-authority-opposes-police-plan-to-install-face-recognition-cameras-1.10073304>

12 [https://www.law.co.il/media/computer-law/ppa\\_comments.pdf](https://www.law.co.il/media/computer-law/ppa_comments.pdf)

13 <https://techpolicy.org.il/blog/itpi-comments-on-the-draft-bill-to-authorize-law-enforcements-use-of-special-photography-systems-lpr-fr/>

14 [https://www.english.acri.org.il/post/\\_344](https://www.english.acri.org.il/post/_344)

15 A "Serious Felony" is defined, for the purposes of this bill, as a felony whose punishment is at least ten years of imprisonment, unlawful possession of firearms, use of firearms in residential areas or in a manner that may endanger persons and extortion.

16 The Bill to Amend the Criminal Procedure Ordinance (Arrest and Search) (Causes for Search Without a Court-Issued Warrant) (Temporary Provision), 2021.